

Colloquy

realized he couldn't represent two sides. There was a conflict of interest.

The Court: I don't see any conflict of interest at the moment. Whom does he represent now?

Mr. Todaro: He represents one of the brothers, and the one brother who pleaded guilty is a Government witness.

The Court: Is the other brother going to testify?

Mr. Kantor: Yes, he will testify.

The Court: And does Mr. Solomon still represent him?

Mr. Kantor: I am not sure of that either. I spoke to Mr. Solomon with reference to the other brother. I asked him if he would be here today and he said he would not. He mentioned something that he had not gotten his full fee.

As to whether he will represent the other brother, I cannot say.

The Court: Mr. Solomon has not been released by the Court, has he?

Mr. Kantor: No.

The Court: You tell Mr. Solomon to get down here, and I will deal with him.

(5) What kind of a case is this?

Mr. Kantor: It is an alcohol tax case.

The Court: Is it a matter of great complexity?

Mr. Kantor: No, it is quite simple.

The Court: Why, then, is there this need for time? You knew about the situation Saturday, Mr. Todaro.

Mr. Todaro: I got a copy of the indictment. That is all I have, and a little statement I had with my client.

The Court: Tell me what are the facts.

Mr. Kantor: The Government's case will take approximately two hours. The facts are these. A certain car was under observation; Angelo Benanti was seen in that car. He drove uptown and was arrested.

He has made the statement and will testify that earlier that same evening, his brother came to his house and asked

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him to drive the car, told him it was alcohol and offered to pay him. That is all.

The Court: I don't see anything so complex about that.

Mr. Todaro: I would want a day or two.

The Court: I have a jury panel here waiting for you to try the case. The talesmen are drawn. They (6) are in the courtroom, and now you come in and tell me you want two days. I don't think your application is timely.

We will go ahead, and tell Mr. Solomon to come down and be here at 12.30.

Mr. Todaro: I did speak to him last night and he said he would be here this morning. I will renew that call.

(The following took place in open court in the presence of the talesmen:)

Mr. Kantor: The Government is ready, you Honor.

Mr. Todaro: The defendant is not ready, if your Honor pleases, and for the record I want to state that I have spoken to this defendant approximately ten or fifteen minutes—

The Court: You made your statement for the record in chambers. I don't want to say anything further in front of the jury panel. I understand your position, and I am directing you to go ahead, anyhow.

Mr. Todaro: Exception.

(7) The Court: Where is the defendant?

All right, we will proceed.

(A jury was duly empanelled and sworn.)

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John A. Francis—for Government—Direct

(8) JOHN A. FRANCIS, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kantor:

Q. Mr. Francis, by whom are you employed? A. By the Police Department of the City of New York.

Q. May I direct your attention to the night of May 9, 1956. Where were you on that night? A. I was in the vicinity of Elizabeth and Spring Street.

Q. What did you observe at that time? A. At that time I was observing the Reno Bar. I had the Reno Bar under observation.

Q. Whom did you observe there? A. On May 9th, I did observe Salvatore Benanti come from and go into the Reno Bar at 168 Elizabeth Street.

Q. Had you seen this man at any other time? A. Yes, I had.

Q. When? A. I had seen him on several occasions prior to that date riding around in a green Chevy.

Q. Did you see that green Chevy on May 9th? A. Yes.

(9) Q. Where? A. It was parked on Mott Street between Bleeker and Houston.

Mr. Todaro: I move to strike out all this testimony as to what happened on Friday, May 9th, or what he saw prior to May 9th. We are concerned with this indictment.

The Court: I will let it stand.

Mr. Todaro: Exception.

Q. And did you see Salvatore Benanti park this green Chervolet? A. I did. I saw him park the Chevy on May 10th between 12.30 and 1.00 a.m. in the morning. He parked

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the Chevy on Mott Street between Houston and Bleeker. He got out. He locked the doors and he walked back to the Reno Bar.

Q. What did you do? A. I immediately went up to the car and tried to look inside of it.

Q. Did you see anything inside? A. Well, all I could see was cardboard in the back of the car. That is all.

Q. Did you look at the back seat of the car. A. Yes, I did.

(10) Q. And you could see a cardboard? A. I could see a cardboard where a seat should have been.

Q. There was no seat? A. No, sir.

Q. Could you describe the size of the cardboard? A. It appeared to me like—

Mr. Todaro: Objected to, what it appeared.

The Court: I will let it stand.

The Witness: It looked like a Kellogg carton in which you pack large boxes of cornflakes, not flattened out, and placed in the rear seat where the regular seat would be.

Q. Do you know Salvatore Benanti? Can you recognize him? A. Yes, sir.

Q. Is he in the courtroom today? A. Yes, sir.

Q. Would you point him out? A. He is sitting right there by the attorney (indicating).

Q. And that is the man you saw on the date you have described? A. Yes, sir.

(11) Mr. Todaro: I move to strike out this testimony as not having any bearing to this indictment.

The Court: I will let it stand.

Q. Mr. Francis, you say you saw Salvatore Benanti later that evening in the Reno Bar? A. Yes, sir.

John A. Francis—for Government—Direct

Q. Would you describe what you saw him do that night?

A. After he went back into the bar, he did stay in the bar and then he did come out and stand in front of the door of the bar. In other words, he would go in and out of the bar on different occasions.

Q. Did he ever go back to the car? A. No, I did not see him go back to the car.

Q. Did he ultimately go home? A. Yes, he went back to his house that night.

Q. About what time was that? A. I would say between 3 and 3.30 that morning of May 10th.

Q. Did you see him again the next day? A. Yes, sir, I saw him between 5 and 6.

Q. Where was that? (12) A. He was in the vicinity and in the Reno Bar, and he came out of the Reno Bar, and I saw him walk up to Spring Street along Elizabeth and engage in conversation with a male.

Q. Do you know who that person was? A. At the time, no, but now I do.

Q. Do you know who he is today? A. It is his brother, Angleo Benanti, and they had a short conversation on the corner of Spring and Elizabeth, and Salvatore Benanti returned to the Reno Bar.

Q. What was the time of that conversation? A. I didn't have a watch.

Q. Approximately? A. I would say it was between 5 and 6 p.m. in the evening. It was summertime, so it was light.

Q. Are we talking about May 10, 1956? A. Yes, sir.

Q. And you say you went to the Reno Bar about what time? A. I didn't go there, but I saw him in the vicinity of the Reno Bar between 5 and 6 that evening.

Q. And you saw Angelo speak to him somewhat (13) later than that? A. Yes. May I clarify that again?

Between 5 and 6, I did see Angelo leave the vicinity of the

John A. Francis—for Government—Cross

Reno Bar and walk to Elizabeth Street, and thereupon he did speak to his brother, Angelo.

Q. You said Angelo Twice. A. I saw Salvatore leave and speak to his brother Aneglo. Then he returned to the Reno Bar.

Q. Did you leave the vicinity at that point? A. No, sir.

Q. When did you leave the vicinity? A. I left the vicinity when the car in which I was had a radio message. It stated that Unit 1—

Mr. Todaro: I object to this conversation and message.

The Court: I will exclude the message. You got a message on your car.

Q. You drove off in the car? A. I did not, but Detective Sidney Sheppard did.

Q. And you were in that car? A. Yes.

(14) Mr. Kantor: No further questions.

Cross Examination by Mr. Todaro:

Q. Officer, you were in the vicinity of this Reno Bar quite frequently? A. Yes, sir.

Q. Did the Police Department have a tap on the Reno Bar, if you know? A. Yes, they have several taps on the Reno Bar.

Q. Did you obtain any information as part of this investigation from the wiretap conversation? A. Did I obtain any information in regard—

Q. Yes, in reference to the Benantis. A. Benanti?

Q. Yes. A. Yes.

Mr. Kantor: Could you make that a little more specific?

John A. Francis—for Government—Redirect

Mr. Todaro: The answer is yes.

Q. You also obtained information as a result of this wiretap that this car was going to be driven to a certain location? A. Yes.

Q. And that is how you apprehended the car when it reached its destination. Is that correct? (15) A. No—

Mr. Kantor: I object to that, your Honor.

The Court: Objection sustained.

Q. But you had obtained some information through the wiretap which gave you a lead to this trap? A. Part of the information:

Mr. Kantor: That is all, officer.

Redirect Examination by Mr. Kantor:

Q. Detective Francis, this wiretap that you speak of, was this authorized? A. Yes, sir.

Q. Could you describe the authorization? A. No, I couldn't, but I can—

Q. It was an authorized wiretap? A. It was authorized by a Judge in New York State.

Q. Judge of the Supreme Court, State of New York? A. Yes, sir.

Mr. Kantor: That is all.

(Witness excused.)

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John C. Macauley—for Government—Direct

(16) JOHN C. MACAULEY, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kantor:

Q. Detective Macauley, may I direct your attention to May 10, 1956.

Where were you at approximately 12 noon or 1.00 o'clock on that day? A. I was in the vicinity of Elizabeth Street and Kenmare Street.

Q. Had you had a conversation with anyone before you went there? A. Yes, sir, I had a conversation with my partner, Detective John Francis.

Q. When you went to this location, what did you find? A. We were keeping a premises under observation at that time. I saw the defendant standing in front of the premises.

Q. What was that premises? A. That is the Reno Bar and Grill.

Q. Did you go anywhere else in the area at that time? A. Later in the day I did, yes, sir.

(17) Q. Where did you go? A. I went to the vicinity of Mott Street and Bleeker.

Q. What did you see there? A. I saw a vehicle parked there.

Q. Could you describe that vehicle? A. Yes, sir, it is a light green Chevy coupe, license No. KA-3881 New York.

Q. Do you remember the year approximately? Was it a new car? A. No, it wasn't. It was a 1948 I believe.

Q. Did you observe this Chevrolet for a period of time? A. Yes, I did.

Q. Did anyone enter it? A. Yes, sir.

Q. Who entered it? A. A person now known to me as Angelo Benanti.

John C. Macauley—for Government—Direct

Q. About what time did you see him enter the car? A. Somewhere between the hours of 6 and 7 p.m.

Q. What did he do? A. He got into the car and drove off.

Q. What did you do? (18) A. I followed him.

Q. Where did you follow him to? A. We followed him to the East River Drive, up the East River Drive to 125th Street, crosstown to Lenox Avenue. It went up Lenox Avenue to 136th Street, and at 136th Street between Lenox and Fifth, I stopped the car.

Q. What happened? A. I identified myself as a police officer and opened the door, and told Angelo Benanti to get out.

Q. Did you examine the contents of the car?

Mr. Todaro: I object to all this testimony as not binding upon this defendant in this indictment, and I move to strike it out.

The Court: I will let it stand. We can pass, of course, on connection later.

Q. Did you examine the contents of the car at that time? A. I did.

Q. What did you find? A. There were 11 five-gallon cans containing alcohol.

Mr. Todaro: I move to strike it out, if (19) your Honor pleases.

The Court: I will let it stand.

Mr. Todaro: Exception.

Q. Did you notice anything else about the car or its contents? A. No. The rear seat was missing from the car.

Q. How about the contents of the car? Did you see any tax stamps? A. No, I did not.

John C. Macauley—for Government—Direct

Q. Did you smell anything? A. I smelled alcohol, yes, sir.

Q. Did you take Angelo Benanti back to the precinct house at this time? A. Not immediately, no, sir.

Q. What did you do? A. I questioned him on the scene.

Mr. Todaro: I object to all that passed between Angelo Benanti and this officer.

Mr. Kantor: I will move on, your Honor.

The Court: All right, I will let this stand.

Q. Did you ultimately bring Angelo Benanti to the precinct? A. I did.

(20) Q. And did you book him? A. Yes, sir, we did.

Q. Do you know anything about wiretapping on this case? A. Yes, sir.

Q. Could you answer either yes or no as to whether the wiretapping had anything to do with alcohol or unpaid tax alcohol?

Mr. Todaro: I object to the form of the question as leading and suggests of an answer.

The Court: I don't think it is suggestive, but I will sustain your objection as to form.

In other words, you want a general question, Mr. Todaro?

Mr. Todaro: Yes, sir.

The Court: All right, ask him in general terms.

Mr. Kantor: May I approach the bench for a minute?

The Court: Yes.

(The following took place at the bench out of the hearing of the jury:)

The Court: The United States Attorney has just

John C. Macauley—for Government—Direct

stated to me that the reason for the narrow (21) limits of his question is that this is a narcotics case, and he did not want to embarrass the defendant.

Now, Mr. Todaro, if you still press your objection—

Mr. Todaro: The former officer testified that as a result of the wiretap, they followed the car.

The Court: If you ask a general question as to the particulars regarding the placing of this tap, you are going to get this information. If you don't object, I will direct the United States Attorney to proceed.

Mr. Todaro: I don't want to be prejudiced on the issue of my motion to suppress, on the ground that the information is obtained as the result of wiretap. Therefore, my motion to suppress will fall.

The Court: That is all right.

Mr. Todaro: It doesn't make any difference if it was narcotics. I don't think the mere fact that they were authorized to make a wiretap confers any greater power on them.

The Court: Is there any harm in his (22) asking the question in substantially the same form, whether these taps were placed on these premises in connection with this particular case or crime? Then he won't disclose what their true purpose was.

Mr. Todaro: The former officer Francis testified that the wiretap resulted in their following the car.

The Court: Yes.

Mr. Todaro: That was his testimony. Therefore, the wiretap unquestionably led to the obtaining of this alcohol and then my motion to suppress would go.

The Court: I understand you. He wants to develop that the tap was not initiated for the purpose of this case, and I see no harm in letting him do it.

John C. Macauley—for Government—Cross

Mr. Todaro: I see no harm. The end result is the same. The information was obtained by wiretap.

The Court: I will put the question myself.

(The following took place in open court in the hearing of the jury:)

(23) *By the Court:*

Q. Mr. Macauley, I think you can probably answer this yes or no.

Was any wiretap placed on these premises in connection with this particular case or this particular charge? A. No, there was not.

The Court: All right.

Mr. Kantor: I have no further questions of the witness.

Mr. Todaro: At this point, no questions.

Will your Honor instruct him to remain? I may have to recall him.

The Court: Can't you go ahead with your cross examination now?

Mr. Todaro: All right.

Cross Examination by Mr. Todaro:

Q. How long did you have that tap on that Reno Bar?

A. I should say roughly about a month, a month and a half.

Q. And did you listen to many of the conversations that went on between Salvatore Benanti, Angelo Benanti and others on the tap? (24) A. Yes, sir.

Q. And you obtained certain information as a result of

Charge of the Court

these conversations through the telephone. Is that correct?

A. Yes, sir.

Q. Did ~~you~~ have a tap on his private line? A. No, sir.

Q. But you listened to many conversations of Salvatore and Angelo Benanti with others. Is that correct? A. Yes, sir.

Q. When this particular incident took place that this car was driven, you had obtained some information before that, hadn't you, that this car was going to go somewhere?

A. Yes, sir, we had.

Q. And that was through the wiretap. Is that correct?

A. Yes, sir.

Mr. Todaro: That is all.

(Witness excused.)

(25)

CHARGE OF THE COURT

The Court: Mr. Foreman, ladies and gentlemen of the jury: Before I instruct you on the law in this case, I would like to thank you for the care with which you followed it. You don't judge the importance of a case by its length, by its complexity or by its simplicity. Any case that is brought on before this Court for trial is an important case, important to a lot of people, and it is very gratifying to me to have watched you and to see that you have paid such careful attention to it.

Now, I will tell you certain things that apply to all cases, and then I will tell you a little bit about the crime which is here charged, and then I will tell you about some of the rules of evidence which may help you in your deliberations.

Charge of the Court

The first thing we ought to get clear is the division of responsibility. As far as the facts of this case are concerned—what the witnesses said and whether you believe the witnesses (26) or not, whether what they said is important or not, what it all adds up to—those are all questions on which your conclusion is paramount. You are the judges of the facts, and if counsel said something inconsistent with your recollection of the facts, or if I say something inconsistent with your recollection of the facts, disregard it because it is an unintentional slip on the part of whoever said it.

In the course of my discussion of the law, I may refer to some bits of evidence as I recall it. I may be wrong. As I discuss this charge, I am thinking in terms of rules of law, and not primarily questions of fact, and if I say something inconsistent with your recollection, disregard what I say and follow your own recollection.

I would like to again tell you what I told you when you first sat in the jury box—that an indictment is simply a charge that asks you a question whether or not something is true. This indictment in itself is no proof of guilt. It merely raises this question for investigation and for trial.

(27) The defendant has pleaded not guilty. He says it is wrong; it did not happen. That puts the issue before you to be decided.

Now, under the law, persons charged with the commission of crime are presumed to be innocent until their guilt has been established beyond a reasonable doubt. A defendant is not bound to prove that he did not commit the crime; rather, the Government must prove beyond a reasonable doubt that he did commit it, and only the legal evidence presented before you may be considered in this respect.

Now, what is a reasonable doubt? A reasonable doubt means a doubt founded upon a reason. It does not mean

Charge of the Court

a fanciful doubt or a whimsical or a capricious doubt, for anything relating to human affairs and depending upon human testimony is open to some possible or imaginary doubt. If you did not see something happen yourself, you listen to somebody else tell you what happened and you can always conjure up some imaginary doubt or some fanciful doubt if you want to. But the doubt which would control here is a reasonable doubt. In other words, (28) a doubt for which you give a reason as distinguished from a doubt for which you cannot give a reason.

When all of the evidence in the case, carefully scrutinized, compared and weighed by you, produces in your mind a conviction or belief of a defendant's guilt, such a conviction as you would be willing to act upon in matters of the highest importance relating to your own affairs, if it leaves your mind in a condition where you find an abiding conviction as to the truth of the charge, then you could be said to be free from a reasonable doubt. You would be convinced beyond a reasonable doubt.

Putting it another way, absolute, mathematical certainty is not required, but there must be such certainty as satisfies your reason and judgment, such that you feel conscientiously bound to act upon.

Now we come down to the charge in question. The grand jury charges that on or about the 10th day of May 1956 in the Southern District of New York, Salvatore Benanti, the defendant, unlawfully, wilfully and knowingly possessed a quantity of distilled spirits, the (29) immediate containers thereof not having affixed thereto, in such manner as to be broken on opening the container, stamps evidencing the tax or indicating compliance with the provisions of Title 26.

As I told you when you were selected as jurors, there is a tax upon distilled spirits, and the mechanics for enforcing that tax require the imposition of a stamp on any

Charge of the Court

container of distilled spirits in such a way that if you take the cork out or the stopper off, you will break the stamp. Those of you who have ever had relations with distilled spirits will know if you open a bottle of whiskey, you have to break a stamp to do it.

This was a different kind of container and perhaps a different kind of stamp, but the principle is the same. The law provides that no person shall transport, possess, buy, sell or transfer any distilled spirits unless the immediate container thereof has affixed thereto, in such manner as to be broken on opening the container, a stamp evidencing the tax or indicating compliance with the provisions of this chapter.

(30) Now, there are certain exceptions to the law. For example, if you are going to consume the spirits on the premises, that would be an exception. Spirits in bond is another exception. If it is in a reclassifying plant, that is another thing; Or if it is distilled spirits which are not going to be sold, that is an exception. In other words, if you had for some reason distilled something on your own premises which you were going to drink, you would not have to pay a tax on it, but if it is distilled spirits which are going to be sold, why, then you need this stamp.

The first charge is that this defendant possessed distilled spirits in containers without the required stamp. The second charge is that on the same night he transported it.

To find violation of this law then, you would have to find that there were distilled spirits in this car, that the stuff in this car was distilled spirits as the Department chemist is stipulated to have testified; that they did not have stamps on the containers; that they were being transported or possessed for the purposes of sale. Those are the elements of (31) the crime.

In the commission of a crime, it is not necessary that

Charge of the Court

the person charged perform all of the elements. Sometimes he can get someone to do it for him. The testimony here is that as far as the transportation is concerned, on this particular night, as I recall it—and your recollection should control—the defendant Salvatore did not drive the car, but that his brother Angelo drove it. The Government contends, however, that Angelo did this as agent for Salvatore, as Salvatore's accessory, so to speak.

If you are convinced beyond a reasonable doubt that that is true—that Salvatore knew there were distilled spirits in this car, that they were not stamped and that they were to be sold, and he directed Angelo to do that for him, to transport it and collect for the sale—why then, you may return a verdict of guilty.

On the other hand, if you have a reasonable doubt as to any of the elements of this crime, why, your verdict would be not guilty.

Now, the question of whether a person knows something or not you find in many crimes. You have (32) to decide: Did somebody know something? In this case you have to decide: Did Salvatore know that this alcohol did not have tax stamps on it? And in considering what a person knows or does not know, you may consider the way in which the transaction was carried out or what they said, and you may take into account the fact that the automobile was registered under a different name for which there was no proof of ownership. But to take that into account, you must be convinced beyond a reasonable doubt that the defendant knew it. In other words, you must measure what he did in the light of what you believe he knew. At the same time, you conclude what he knew by what he did and what he said.

In so far as the witness Angelo Benanti is concerned, I will charge you that in this case he must be regarded as an accomplice. In other words, you must listen to his tes-

Charge of the Court

timony and appraise it as you would a person who was a party in the alleged crime.

That is the great purpose of a jury. It is the sort of thing that you have to appraise in the light of your experience, and it is the sort of (33) thing where you have 12 people do it rather than the Judge alone because it is a matter of judgment. Now, you look at a witness. You have listened to his testimony and you decide whether it seems to be reasonable to you in the first place. Does it make sense? Does he seem to be a person who is bright enough to observe things and to relate them accurately?

You look at his demeanor. Did he testify frankly or did he testify as though he were withholding something from you?

You may take into account whether he would have any interest, for any reason, to lie, either to hurt the defendant or to help him, or to hurt himself or to help himself.

Then with respect to an accomplice, you look to see whether there is corroboration. In other words, are there other things in the case which are told to you by other witnesses which tend to corroborate what this witness said and therefore make it that much more likely that he was telling the truth? In this case, you have the testimony of the police officers as to what they saw happen with respect to this car, and you (34) have heard their testimony here this morning. I am not going to take the time now to repeat it for you.

Incidentally, if there is any testimony that you don't recall, you can always have it read back, but your recollection of it is what is going to control and not mine.

That is about what this case boils down to.

Mr. Benanti has said how he got into the car and what he was doing with it. Then the two police officers have testified as to seeing Salvatore in the car and in about the vicinity, and the locked condition of the car when they saw it.

Charge of the Court

You have heard the testimony and you sift it and appraise it all together, and you must decide whether you get the picture of the transaction and whether it convinces you beyond a reasonable doubt of the defendant's guilt.

As you probably all know, a jury in a criminal case, of course, must act by unanimous verdict. Each of you has an obligation to come to your own conclusion and to come to it earnestly and seriously. At the same time you each have an obligation to try to reach a unanimous verdict (35) if you can. In other words, you must never vote for a verdict you don't believe in yourself, but at the same time you should not be just stubborn and obstinate and refuse to discuss the matters with your fellow jurors because, as I have told you, you have been particularly attentive and just as each one of you has followed this testimony attentively, so have 11 other of your fellow jurors followed it carefully, and they have got their views just as you have yours.

Therefore, I suggest at the outset that you talk it over, that you be prepared to give reasons for your own view, and that you listen with just as much courtesy to the views of others as you would like to be listened to yourself.

Of course, you will reach your conclusion without sympathy or prejudice to either side. You are not confronted with the question of whether a person should be punished or whether he should not, or whether the law should be one way or whether it should be another. The questions of law and punishment and those things are for the Court and not for you.

Your job is to come back and report on (35a) the facts. You have been asked a question of fact: Did something happen? Under your duty, the only thing your oath calls upon you to do is come back and give the Court your honest opinion as to whether something happened or it did not.

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If on all the facts you have a reasonable doubt as to this defendant's guilt, your verdict will be not guilty. If on all the facts, on the other hand, you are convinced beyond a reasonable doubt that he did commit these acts as he is charged with doing, your verdict should be guilty.

There are two counts. One is the possessing of the spirits and the other is the transporting of it, and you will render your verdict as to each count.

Are there any requests or exceptions?

Mr. Kantor: No.

Mr. Todaro: No.

(35b)

New York, October 30, 1956;
10.30 o'clock a.m.

HERBERT C. KANTOR, Esq., and ARNOLD G. FRAIMAN, Esq.,
for the Government.

GEORGE J. TODARO, Esq.,
for the Defendant.

The Clerk: United States of America v. Salvatore Ben-
anti. Gentlemen.

Mr. Todaro: Ready.

Mr. Kantor: Government is ready.

The Court: Do you want to say any more about your motion?

Mr. Todaro: If your Honor please, I think all that can be said we said. I find no case that does not sustain the position that in the Federal Courts evidence tainted by wiretapping is inadmissible. All the line goes along that way. The Federal Communications Act excludes no one.

Argument on Defendant's Motion

The language is very emphatic. There cannot be any other determination than this evidence cannot be admitted (35e) in the Federal Court.

The Court: What do you say about the Weeks case?

Mr. Todaro: The Weeks case?

The Court: Yes. Even assuming you are right that the State officers violated the Federal statute, under the Weeks case would the evidence be admissible if there was no Federal complicity in the acts of the State officers?

Mr. Todaro: If your Honor please, the United States Supreme Court in *Schwartz v. Texas*, where that Communications Act was invoked on behalf of a person tried in the State Court, that was decided by the Supreme Court by a divided court and they held that the State had the right to use that evidence in the State Court but they did also say:

“We hold that Section 605”

This is the Supreme Court “applies only to the exclusion in the Federal Court proceedings of evidence obtained and sought to be divulged in violation thereof. It does not exclude such evidence in State Court proceedings.”

If we note the language, it says, “We hold (35d) that Section 605 applies only to the exclusion in Federal Court proceedings.”

Now, there was a dissenting opinion there. Some of the judges felt that that exclusion should apply even to State Courts, and here we have an act of Congress which is the supreme law of the land, it supersedes the State laws. Congress said:

“No person shall”—

And that excludes no one, your Honor. And in a Federal Court, as stated in the *Nardone* case which I cite on page 3 of my brief it says, as the Supreme Court interprets the

Argument on Defendant's Motion

act, it requires the exclusion not only of the wrongfully intercepted conversation but also of the evidence obtained by its use since such evidence is a fruit of the poisonous tree. That is the Supreme Court in the Nardone case.

That applied to intrastate as well as interstate communication as decided by the Weiss v. United States case.

I cannot see any other choice in the matter, your Honor, than that this evidence should be suppressed. And on the point you say the Federal officer did not in any way participate in (35e) this, I say they did. You take the United States chemist. He made the analysis on behalf of the United States Government, and it is exactly that testimony which I objected to.

The Court: But the Federal officers did not participate in the tap in any way. They did not even know about it.

Mr. Todaro: But here the State officer brought the fruit of the poisonous tree to the Government official and they had it analyzed and the Government sought to have that evidence introduced. While I conceded he would have so testified, I objected to the testimony on this ground.

The Court: Mr. Kantor, do you want to add anything to what you have in your brief?

Mr. Kantor: Your Honor, I think the Government's brief presents its case fairly fully. Solely in answer to what has been said in court today, the Government agrees that the Communications Act applies only to Federal Courts as suggested by Mr. Todaro. It also agrees that the Fourth Amendment applies only to Federal Courts. However, this does not say that it applies in every situation (35f) in a Federal Court, just that the Fourth Amendment does not apply to every situation in a Federal Court as to the admissibility of evidence, the conclusion being that in a Federal Court, in a situation such as we have before us today, the evidence would be admissible in a Federal Court.

Argument on Defendant's Motion

Mr. Todaro: Justice ~~Palmieri~~ recently decided the Costello case where they sought to take his citizenship way, and there was wiretapped information obtained by the official who testified—

The Court: By the Federal officer?

Mr. Todaro: There they held that it was not admissible. I haven't found one case that holds otherwise, your Honor.

The Court: Is there any evidence here that any of the conversations overheard were those of the defendant?

Mr. Todaro: Sure, your Honor. The State officer testified in answer to my cross-examination. Your Honor may recall I asked him:

“Did you intercept a telephone communication?”

He said, “Yes.”

“And did you hear the defendant converse (35g) with some other person?”

“And as a result of that conversation did you follow the car?”

The Court: There is no doubt about that, is there?

Mr. Kantor: To eliminate any doubt whatever, Salvatore Benanti was on one end of the phone conversation.

The Court: That is what I thought.

Well, I am going to deny defendant's motion. I think that the Weeks* case would apply even if there were no State statute which the State officers were following but where the action of the State officers was authorized by a State statute, I think there is all the more reason why we should follow the rule of the Weeks case in this particular matter. (See *People v. Feld*, 305 N. Y. 322, 329.) So I will deny the defendant's motion.

Now we come to the question of sentence, Mr. Todaro. Would you like to speak on that?

*Weeks v. U. S., 232 U. S. 383; See also *In re Milburne*, 77 F2 310, 311.

Motion to Set Aside Verdict—Denied

Mr. Todaro: I also would like to move to set aside the verdict, if your Honor please, upon a further ground, that when I came into this case I urged upon your Honor to adjourn the matter (35h) as I was unfamiliar with the matter. As a matter of fact, your Honor knows I wasn't paid, I had only discussed the question of a fee, I had not discussed the matter of the evidence, and at the trial I even had to borrow a piece of paper from my adversary to proceed with the trial. I absolutely had no knowledge of the facts.

That I also urge as a reason for setting aside the verdict,

The Court: Except for the fact that you may have borrowed a piece of paper, I saw no evidence of lack of preparation. You seemed to follow whatever points there were to be made in the case and particularly moved in on the wiretap, which I don't think the prosecutor knew about. Anyhow, if you worked in this case without preparation, you did it well.

Mr. Todaro: Thank you.

The Court: So I will deny your motion.

Mr. Todaro: In so far as sentence, your Honor, the defendant is married, has a family and the violation alleged is that there were 11 cans of alcohol involved. I think that under the circumstances, your Honor, to temper justice with (35i) mercy, I don't think this is the type of matter—the defendant hasn't got much of a record—I don't think he has any record.

The Court: He has petty larceny.

Mr. Todaro: He has a wife and children, your Honor, and I don't think they should be punished. That is about all.

The Court: What do you have to say, Mr. Kantor?

Mr. Kantor: Your Honor, I think the probation report is probably fairly complete. I would like to add information that is perhaps only known to me because of my posi-

tion in the case, and that would be as to the defendant's attitude when he was arraigned and his attitude during the course of the proceedings. He has been as uncooperative as it is possible for a defendant to be. He refused to speak to anyone. The only attitude that he manifested to anyone or at any place was absolute arrogance.

On the question of what the defendant is presently doing, the Government does have information and it believes that he is still active in similar acts to those that are charged in the indictment (35j) upon which he has been convicted.

The Court: That is this alcohol business?

Mr. Kantor: Yes.

The Court: Do you have any idea of the scale on which he is active?

Mr. Kantor: Your Honor, I wouldn't want to say too much on this. I think I can safely say, however, without giving up too much information, that it is a fairly large scale, that he is apparently in the same capacity we are talking about today, as he has been under the indictment as charged, where he is charged with running alcohol. He is doing approximately the same thing today.

The Court: Well, Mr. Benanti, I don't know how I can impress on you the seriousness of what you are doing. I feel that I cannot put you on probation. I think that you have probably gotten into this business by stupidity rather than any carefully thought out plan, and I think all that I can do is to take you out of it for a while and hope that you will realize that you were not smart in getting into it, that there are easier ways to make a living and make a better living.

(35k) I am going to impose a sentence of 18 months. I will say further—I will say it perfectly bluntly—that if you can learn your lesson faster and realize that you are being sensible if you help the Government instead of trying to get in conflict with it, while it is still within my

Sentence

power to change the sentence I am perfectly willing to consider your application in that regard, but in the absence of any such manifestation I think 18 months is a necessary sentence in this case.

Mr. Todaro: Would your Honor fix bail pending appeal?

The Court: Yes. What bail is he on now?

Mr. Kantor: He is presently on \$500 bail. I would like to recommend \$2,000 pending appeal.

The Court: Do you think—

Mr. Kantor: In view of the fact he now stands as a man convicted by a jury I think that would be wise.

Mr. Todaro: The Government request is fair, I will say that, but the last time we had (351) the same discussion after the jury convicted this defendant I urged your Honor to continue him under the same bail. I said he is a family man, he has a wife and children. He is not going to run away. The purpose of bail is only to assure his reappear-ance. It is my humble belief that raising the bail will only mean a little more hardship, we will have to pay a bonds-man more money.

The Court: Mr. Todaro, there is no inclination on my part to increase his hardship, but I do think that after I have imposed sentence I would be neglectful if I left bail at such a low amount. I will make it \$2,000 as requested.

Mr. Todaro: Would your Honor give us until 4 o'clock to post that bond?

The Court: Yes, I will. Incidentally, the 18 months is on both counts to run concurrently.

Judgment and Commitment

(40)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

On the 30th day of October, 1956 came the attorney for the government and the defendant appeared in person by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly possessing and transporting a quantity of distilled spirits, the immediate containers thereof not having affixed thereon stamps evidencing payment of the tax. (Title 26, Secs. 5008(b) (1) and 5642 USC). as charged in counts one and two and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the attorney general or his authorized representative for imprisonment for a period of Eighteen (18) months on each of counts one and two to run concurrently. Bail fixed at \$2000. pending the appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

WALSH

United States District Judge